STATE CONSTITUTIONAL DOCTRINE AND THE CRIMINAL PROCESS

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I. INTRODUCTION

In a nation conditioned by the assumption that the content of federal constitutional guarantees provides the cutting edge for the development of constitutional doctrine, the recent "rediscovery" of state constitutions as a source of individual rights presents something of a problem. Hailed at the outset as a pragmatic opportunity for the states, in the exercise of their sovereignty, to provide greater constitutional protections to their citizens than does the federal government,¹ this rediscovery has resulted in a judicial approach that has been largely interstitial and reactive. In most instances, decisions resting upon state constitutional grounds have addressed issues and focused their analyses in ways that have previously been considered and applied in the federal context.² While this process has been predictable—both courts and lawyers tend to be receptive to the familiar—the interstitial approach has been the target of significant criticism.³

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³ See Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. BALT. L. REV. 379, 394-96 (1980) [hereinafter cited as Linde, First Things First]; Williams,
Postponing a fuller consideration of the justifiability of this criticism for the moment, it is clear that the effect of this approach has been to slow the development of a sound methodology for approaching state constitutional issues.

In addition to evaluating this pattern of interstitial decision making, most critical commentary has focused upon the propriety of reliance upon state constitutional provisions, rather than upon the appropriate methodology for such interpretation. This tendency may be prompted by a healthy appreciation of both the diversity among state constitutional provisions and the pitfalls of generalization. Nevertheless, some observations do seem possible, and it is the object of this discussion to begin to examine some of the considerations that should underly the development of state doctrine in a distinct area of constitutional law: that dealing with the criminal process. Before turning to the unique nature of state provisions guaranteeing the rights of the accused, it is useful to view them in the context of the singular constitutional tradition from which they stem.

II. SOME HISTORICAL PERSPECTIVE

Thirteen governments thus founded on the natural authority of the people alone, without a pretence of miracle or mystery, which are destined to spread over the northern part of that whole quarter of the globe, are a great point gained in favour of the rights of mankind.4

Virtually all of the major state constitutional guarantees in the areas of criminal law and procedure find historical antecedents in the state constitutions of the revolutionary period. As commentators have noted, these constitutions, predating the federal Bill of Rights, manifested a remarkable combination of faith in a natural law from which personal liberties are derived and in the process of constitutionalism—"the tradition of looking to fundamental documents for guarantees of men's liberties."5 The English tradition of

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constitutionalism was rich indeed, and it was a perceived departure from the letter and spirit of many fundamental guarantees that had fueled discontent before the Revolution. The departures that had occurred were viewed as failures of men and institutions, however, and not as failures of all established principles.

A desire to reinstate, secure, and improve upon the rights of English subjects motivated much of the effort of our early constitutional framers. The most fundamental of these recognized protections were contained in the Magna Carta, that Great Charter of largely baronial liberties extracted from a reluctant King in 1215. During the Middle Ages, the Magna Carta attained a far wider application to Englishmen generally, and its provisions came to enjoy a status above that of ordinary statutes. Indeed, its treatment as paramount law was reflected in 1368, when a statute of Edward III declared "that the 'Great Charter and the Charter of the Forest be holden and kept in all Points; and if there be any Statute made to the contrary, it shall be holden for none.'" This concept of a higher constitutional standard, against which acts of Parliament were to be measured, permeated the thinking of many influential American colonists.

Chapter 39, unquestionably the Magna Carta's most significant provision, was later to provide the basis for similar statements of the rule of law in our own federal and state constitutions: "No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land." Professor Howard notes that by 1354, the term "due process" was used in a statute interpreting the Magna Carta, and "by the end of the fourteenth century [the phrases] 'due process of law' and 'law of the land' were [used interchangeably]." There was, of course, later

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6 HOWARD, RUNNYMEDE, supra note 5, at 8-9; see W. McKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 157-59 (2d ed. 1958).
7 A.E.D. HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 24 (1964) [hereinafter cited as HOWARD, MAGNA CARTA] (citation omitted).
8 See, e.g., 2 THE WORKS OF JOHN ADAMS 522 (C. Adams ed. 1850) [hereinafter cited as WORKS OF JOHN ADAMS]. Adams summarized James Otis's famous speech condemning writs of assistance:
   As to Acts of Parliament. An act against the Constitution is void; an act against natural equity is void; and if an act of Parliament should be made, in the very words of this petition, it would be void.
   Id. Otis added, "The executive Courts must pass such acts into disuse." Id. For an examination of the origins of Otis's views and the resulting debate over their validity, see B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 54-58 (1977).
9 W. McKECHNIE, supra note 6, at 375.
10 HOWARD, MAGNA CARTA, supra note 7, at 15.
to be great variety among American "law of the land" and "due process" provisions, with the most significant variation being the applicability of many to civil as well as criminal proceedings. Another provision of the Charter with lasting significance for the criminal process was chapter 40, which provided, "To no one will we sell, to no one will we refuse or delay, right or justice." In addition, chapters 20, 21, and 22 required that amercements, or fines, be proportioned "in accordance with the gravity of the offence."

Other principal sources of individual rights that heavily influenced colonial thought concerning the rights of the accused were the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689. The Petition of Right was a declaration drawn by the House of Commons in response to abuses during the first three years of Charles I's reign. While primary grievances included oppressive taxation and the billeting of soldiers upon the populace, illegal imprisonments and the imposition of martial law also combined to stir popular indignation. The Petition restated chapter 39 of the Great Charter and the subsequent parliamentary declaration "[t]hat no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law." It then added that "divers . . . subjects have of late been imprisoned without any cause shewed" and prayed "that no freeman, in any such manner as is before-mentioned, be imprisoned or detained." Similar relief was requested with regard to the unauthorized use of martial law. When the King assented to the Petition, the chief significance of the event certainly lay in the monarch's acknowledgment of the primacy of legal principle.

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11 See, e.g., Howard, Runnymede, supra note 5, at 479-82 app. (noting variations in due process provisions of state constitutions).
12 W. McKechnie, supra note 6, at 395.
13 Id. at 284; see also id. at 295 (amercement of earls and barons); id. at 298 (amercement of the clergy).
15 See id. at 288-91. See generally F. Relf, The Petition of Right 1, 20-26 (1917).
16 Petition of Right, 1628, 3 Car., ch. 1, § 4.
17 Id. § 5.
18 Id. § 10.
19 See id. See generally 1 Sources of English Constitutional History 450-53 (C. Stephenson & F. Marcham eds. 1972) [hereinafter cited as SOURCES] (reprinting and discussing the Petition of Right).
20 1 SOURCES, supra note 19, at 453 (reprinting the parliamentary proceedings of June 2 and June 7, 1628).
21 See G. Adams, supra note 14, at 295. Adams notes that the reduction in the King's powers was "in harmony with the spirit of . . . constitutional growth." Id.
While the detailed provisions of the Habeas Corpus Act of 1679 greatly widened the availability of the writ and imposed heavy sanctions for its denial, the spirit of the Act was often circumvented by the imposition of excessive bail. This practice was addressed in the Bill of Rights of 1689, the document second only to the Magna Carta in securing, in the minds of the colonists and their contemporaries, the fundamental rights of Englishmen. The product of the Glorious Revolution of 1688 and the accession to the throne of William and Mary, the Bill secured the role of protestantism in government affairs and strengthened the powers of Parliament. It also addressed many of the procedural abuses of the Stuarts, specifically admonishing "[t]hat jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders," and "[t]hat all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void." Also among its guarantees was a provision later to become familiar in our own state and federal constitutions: "[E]xcessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Beginning with the first Charter of Virginia of 1606, colonial charters had followed a general pattern of formally securing for the colonists and their descendants "all Liberties, Franchises, and Immunities" of English subjects "as if they had been abiding and born, within this our Realm of England." Consequently, the body of Eng-

22 31 Car. 2, ch. 2.
25 1 W. & M., sess. 2, ch. 2.
26 See generally W. ADAMS, supra note 5, at 9-10; 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 40-41 (1971) (summarizing history and provisions of Bill of Rights of 1689); E.N. WILLIAMS, supra note 24, at 1-2 (describing the events leading to the accession of William and Mary).
27 Bill of Rights, 1689, 1 W. & M., sess. 2, ch. 2, § 1, para. 11.
28 Id. para. 12.
29 Id. para. 10.
30 VA. CHARTER of 1606, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 17, 22 (W. Swindler ed. 1979) [hereinafter cited as SOURCES AND DOCUMENTS]. Of course, terminology varied in subsequent charters. See, e.g., CAROLINA CHARTER of 1663, art. 7, reprinted in 7 SOURCES AND DOCUMENTS, supra, at 357, 360 (W. Swindler ed. 1978); CONN. CHARTER of 1662, reprinted in 2 SOURCES AND DOCUMENTS, supra, at 131, 134 (W. Swindler ed. 1973); ME. GRANT OF PROVINCE AND COUNTY of 1639, reprinted in 4 SOURCES AND DOCUMENTS, supra, at 268, 276 (W. Swindler ed. 1975); MD. CHARTER of 1632, art. X, reprinted in 4 SOURCES AND DOCUMENTS, supra, at 358, 362; MASS. BAY CHARTER of 1629, reprinted in 5 SOURCES AND DOCUMENTS, supra, at 32, 40 (W. Swindler ed. 1975); NEW ENGLAND CHARTER of
lish guarantees provided the basis for the expansion of individual
rights in colonial enactments. Most significant among these early
statements were the Massachusetts Body of Liberties (1641),
the New York Charter of Libertyes and Priviledges (1683), and
the Pennsylvania Charter of Privileges (1701). The first two were all
the more notable as predecessors to the English Bill of Rights. The
Massachusetts statute contained provisions for equal and impartial
justice without delay, bail, the representation of an accused by
counsel—"Provided he give him noe fee or reward for his
paines"—a protection against repetitive sentencing, and the regu-
lation and guarantee of the right to trial by jury. Though startling
in their severity by modern standards, some limitations upon corpo-
rnal punishment and torture were also included.

Initially vetoed by the Duke of York, but enacted in substan-
tially the same form in 1691, the New York Charter contained
guarantees that included a restatement of chapters 39 and 40 of the
Magna Carta, a separate provision requiring "due Course of Law"

1620, reprinted in 5 Sources and Documents, supra, at 16, 25; R.I. and Providence
Plantations Charter of 1663, reprinted in 8 Sources and Documents, supra, at
362, 368 (W. Swindler ed. 1979); Va. Charter of 1609, reprinted in 10 Sources and
Documents, supra, at 24, 34.

31 Professor Howard's text, chronicling the reliance upon the "liberties of En-
GLISHMEN" in colonial thought, tradition, and law, remains the definitive work in the
area. See Howard, Runnymede, supra note 5, at 14-23.

32 See 1B. Schwartz, supra note 26, at 71-84 (reproducing Body of Liberties).

33 See id. at 163-68 (reproducing Charter of Libertyes and Priviledges).

34 See id. at 170-75 (reproducing Charter of Privileges).

35 Id. at 72.

36 Id. at 74.

37 Id.

38 See id. at 74-80.

39 Id. at 76-77. These sections provided as follows:

43. No man shall be beaten with above 40 stripes, nor shall any
ture gentleman, nor any man equall to a gentleman be punished with
whipping, unles his crime be very shamefull, and his course of life vi-
tious and profligate.

45. No man shall be forced by Torture to confesse any Crime
against himselfe nor any other unlesse it be in some Capitall case where
he is first fullie convicted by cleare and suffitient evidence to be guilty,
After which if the cause be of that nature, That it is very apparent there
be other conspiratours, or confederates with him, Then he may be tor-
tured, yet not with such Tortures as be Barbarous and inhumane.

46. For bodilie punishments we allow amongst us none that are
inhumane Barbarous or cruel.

Id. Section 47 further required "the testimony of two or three witnesses or that
which is equivalent thereunto" before the imposition of the death penalty. Id. at
77.

40 See id. at 163.
before imprisonment or civil penalty, the right to trial by jury, bail in cases other than treason or a felony specified in the warrant of commitment, and a provision governing grand jury proceedings.\textsuperscript{41} Unique provisions in the Pennsylvania Charter of Privileges included the right to call witnesses and the right to counsel in criminal proceedings.\textsuperscript{42}

It was against this historical backdrop that the framers of our early constitutions set about their task. Four state constitutions were adopted before the issuance of the Declaration of Independence.\textsuperscript{43} In response to requests for advice from New Hampshire and South Carolina during the breakdown of their colonial governments, the Continental Congress recommended that representatives chosen in each establish "if they think it necessary . . . such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order . . . during the continuance of the present dispute."\textsuperscript{44} The two resulting provisional constitutions expressly contemplated a possible reconciliation with Great Britain\textsuperscript{45} and concerned themselves

\textsuperscript{41} See id. at 165-66.
\textsuperscript{42} See id. at 173 (Article V). In its limited context, the English Trial of Treasons Act of 1696 had provided similar rights to those indicted for high treason or for misprision of treason. See E.N. Williams, supra note 24, at 53-56 (reprinting parts of the Trial of Treasons Act).
\textsuperscript{43} See infra notes 44-67 and accompanying text.
\textsuperscript{44} 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 319 (W. Ford ed. 1906) [hereinafter cited as JOURNALS] (recommendation of November 3, 1775 to provincial convention of New Hampshire). The wording is nearly identical in the recommendation of November 4, 1775 to the convention of South Carolina. See id. at 326-27; W. Adams, supra note 5, at 58-59. The Continental Congress addressed a similar resolution to Virginia's constitutional convention. See 3 JOURNALS, supra, at 403-04. Nevertheless, Virginia failed to adopt a constitution until after the Congress's resolution of May 10, 1776. See infra notes 47-52 and accompanying text.
\textsuperscript{45} The New Hampshire Constitution, adopted on January 3, 1776, provided as follows:

[F]or the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony, we conceive ourselves reduced to the necessity of establishing A FORM OF GOVERNMENT to continue during the present unhappy and unnatural contest with Great Britain; PROTESTING and DECLARING that we never [sic] sought to throw off our dependance upon Great Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges. And that we shall rejoice if such a reconciliation between us and our parent State can be effected as shall be approved by the CONTINENTAL CONGRESS, in whose prudence and wisdom we confide.

N.H. CONST. of 1776, reprinted in 6 SOURCES AND DOCUMENTS, supra note 30, at 342, 342 (W. Swindler ed. 1976). That of South Carolina, adopted on March 26, 1776, stated that

until an accommodation of the unhappy differences between Great Brit-
solely with the structuring of government. It was not until the famous resolution of May 10, 1776 that the Continental Congress addressed all of the Colonies in broader terms:

Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

This resolution, later termed by John Adams "an epocha, a decisive event," was followed by a preamble on May 15th, and was regarded by some as a virtual declaration of independence. The constitutions of Virginia and New Jersey followed, enacted in June and early July respectively. While the latter contemplated the possibility of a reconciliation with Great Britain, the Virginia Constitution, with its Declaration of Rights and ringing dissolution of colonial government, often served as a model for later state charters.

The adoption of the Declaration of Rights of the Virginia Constitution of 1776 constituted a milestone in American constitu-

S.C. Const. of 1776, preamble, reprinted in 8 Sources and Documents, supra note 30, at 462, 464.

46 See N.H. Const. of 1776, reprinted in 6 Sources and Documents, supra note 45, at 342; S.C. Const. of 1776, reprinted in 8 Sources and Documents, supra note 30, at 462.

47 4 Journals, supra note 44, at 342; see W. Adams, supra note 5, at 59-61.


49 See 4 Journals, supra note 44, at 357-58.

50 See W. Adams, supra note 5, at 61.

51 Enacted on July 2, 1776, the Constitution of New Jersey stated,

Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great-Britain and these Colonies should take place, and the latter be taken again under the protection and government of the crown of Britain, this Charter shall be null and void—otherwise to remain firm and inviolable.

N.J. Const. of 1776, art. XXIII, reprinted in 6 Sources and Documents, supra note 45, at 449, 453.

52 After a lengthy recitation of royal abuses, the Virginia Constitution declared, "By which several acts of misrule, the government of this country, as formerly exercised under the crown of Great Britain, is Totally Dissolved." Va. Const. of 1776, reprinted in 10 Sources and Documents, supra note 30, at 51, 52.

53 See 10 Sources and Documents, supra note 30, at 48-50 (reproducing Virginia's Declaration of Rights).
tional history. When the idea had been proposed to the Continental Congress that the Colonies adopt uniform constitutions, the Virginia Convention had been among those resisting such a development. On May 15, 1776, however, it named a committee to prepare both a plan of government and a declaration of rights. It was in the very concept of including an extensive enumeration of fundamental rights in the organic document of government that Virginia's most exceptional contribution lay.

The Declaration was almost entirely the work of George Mason, a self-educated planter with a firm grasp of English constitutional tradition. It is therefore not surprising that among the Declaration's provisions were a guarantee duplicating the English Bill of Rights' prohibitions against excessive bail, excessive fines, and cruel and unusual punishments, and a variation of chapter 39 of the Magna Carta. Yet, as Professor Schwartz has noted, the document carefully omitted characterizations of these rights as arising from English or colonial law. Instead, it asserted "the law of nature" as their source. The Declaration's protections also included the following requirements:

That in all capital or criminal prosecutions a man hath a right
to demand the cause and nature of his accusation, to be con-

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54 See F. Green, supra note 5, at 55. The state had instructed its delegates at "the Continental Congress to propose a Declaration of Independence, 'Provided, that the power of forming government for, and the regulation of the internal concerns of each colony be left to the respective colonial legislatures.'" Id. (citation omitted).

55 See id. at 63; 1 B. Schwartz, supra note 26, at 231.

56 For a reproduction of George Mason's original draft, see 1 B. Schwartz, supra note 26, at 241-43. See generally id. at 232-35 (explaining Mason's background and his contribution to the Declaration); 1 K. Rowland, The Life of George Mason 228-51 (1892) (discussing the Virginia convention and Mason's drafting of the Declaration); Howard, "For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker, 54 Va. L. Rev. 816, 822-23 (1968) (discussing Mason's part in drafting the Declaration).

57 See Va. Declaration of Rights of 1776, § 9, reprinted in 10 Sources and Documents, supra note 30, at 49.

58 See id. § 8, reprinted in 10 Sources and Documents, supra note 30, at 49. Section 8 provided "that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." Id.

59 See 1B. Schwartz, supra note 26, at 233.

60 Id. Section 1 of the Declaration of Rights stated:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Va. Declaration of Rights of 1776, § 1, reprinted in 10 Sources and Documents, supra note 30, at 49.
fronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself. . . .

A separate article concerning the impropriety of general warrants was also included, although such a provision had been omitted from George Mason's original draft. It stated that such "warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted." Edmund Randolph later wrote that this article "was dictated by the remembrance of the seizure of Wilkes's paper under a warrant from a Secretary of State." The

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61 VA. DECLARATION OF RIGHTS of 1776, § 8, reprinted in 10 SOURCES AND DOCUMENTS, supra note 30, at 49.

62 See 1 B. SCHWARTZ, supra note 26, at 241-43 (Mason's original draft); see also id. at 232 (noting that a provision dealing with warrants was added later).

63 VA. DECLARATION OF RIGHTS of 1776, § 10, reprinted in 10 SOURCES AND DOCUMENTS, supra note 30, at 50.

64 1 B. SCHWARTZ, supra note 26, at 248 (quoting an essay written by Randolph); see Money v. Leach, 97 Eng. Rep. 1075 (K.B. 1765); Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763). In those cases, actions for trespass arose from the issuance and execution of a general warrant following the publication of an allegedly seditious paper, The North Briton, No. 45. See Leach, 97 Eng. Rep. at 1075-76. The warrant was issued by Lord Halifax, a secretary of state, and specified neither the names of the offending "authors, printers, and publishers" nor the places to be searched. Id. at 1078. It instead authorized and directed his messengers and a constable "to apprehend and seize [them], together with their papers, and to bring in safe custody . . . to be examined concerning the premises and further dealt with according to law." Id. The general warrant was issued three days before information was obtained concerning John Wilkes's possible involvement. Wilkes, 98 Eng. Rep. at 494. During that period, evidence was gathered and at least 49 persons, including Dryden Leach, were arrested. See 3 T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 2-3 (11th ed. 1896). When Wilkes, a member of the House of Commons, was arrested and imprisoned on the warrant, his private papers were rummaged and seized from his home. Wilkes, 98 Eng. Rep. at 490-91. His later suit was successful, and at the trial, Lord Chief Justice Pratt commented:

The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

Id. at 498.

Leach, a printer whose home had been searched and who had been detained
Virginia Constitution of 1776 remained in effect until 1830, despite the view of some, including Jefferson and Madison, that the Convention had lacked the authority to adopt such an instrument. The Declaration of Rights' provisions concerning criminal proceedings remained substantially unchanged until 1902.

The influence of the Virginia Declaration of Rights upon others of the revolutionary period was unmistakable, for, as they do today, state constitutional draftsmen borrowed heavily from one another. By 1787, six additional states adopted constitutions with distinct sections enumerating individual rights. The draft constitutions of Vermont, which was not formally admitted to statehood until 1791, were similarly structured, and three other state constitutions included significant procedural provisions guaranteeing the rights of the accused. Of course, of equal historical interest were the decisions for four days, was also awarded damages in a separate action. See Leach, 97 Eng. Rep. at 1075. The judgment was affirmed in 1765, when Lord Mansfield condemned the use of the warrant both for its uncertainty and for the lack of supporting evidence: "It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." Leach, 97 Eng. Rep. at 1088; see also Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) (additional suit arising from these facts).

See 10 Sources and Documents, supra note 30, at 57.


See infra notes 73-86 and accompanying text; see also N.H. Const. of 1784, pt. I (New Hampshire's Bill of Rights), reprinted in 6 Sources and Documents, supra note 45, at 344-47.

See Vt. Const. of 1777, reprinted in 9 Sources and Documents, supra note 30, at 487, 489-90 (W. Swindler ed. 1979); Vt. Const. of 1786, reprinted in 9 Sources and Documents, supra, at 496, 497-99.

See Ga. Const. of 1777, arts. XXXIX, LVIII-LXI (venue, self-representation, no excessive fines or bail, incorporation of habeas corpus principles, jury trial), reprinted in 2 Sources and Documents, supra note 30, at 448-49; N.J. Const. of 1776, arts. XVI, XXII (defendant's right to witnesses, counsel, and jury trial), reprinted in 6 Sources and Documents, supra note 45, at 452; N.Y. Const. of 1777, arts. XIII, XXXIV, XLI (law of the land, right to counsel, right to jury trial, prohibition of bills of attainder), reprinted in 7 Sources and Documents, supra note 30, at 175, 177, 179. Connecticut and Rhode Island retained their colonial charters until 1818 and 1842 respectively. See 2 Sources and Documents, supra note 30, at 144 (Connecticut); 8 id. at 386 & n.* (Rhode Island). Nevertheless, Connecticut's 1776 constitutional ordinance contained a variation upon chapter 39 of the Magna Carta (punishment must be "clearly warranted by the Laws of the State") and a bail provision. See 2 id. at 143 (reproducing the ordinance).
tions of many states to omit rights recognized elsewhere.\textsuperscript{72}

Among the constitutions including declarations of rights, Pennsylvania's reiterated most of the protections in the Virginia Declaration and also established a defendant's right to be heard "by himself and his council."\textsuperscript{73} Its provision governing searches and seizures added the requirement that evidence supporting a warrant be upon oath or affirmation,\textsuperscript{74} and the Pennsylvania Plan or Frame of Government stated that all courts were to be open and justice "impartially administered without corruption or unnecessary delay."\textsuperscript{75} Maryland's Declaration of Rights forbade bills of attainder\textsuperscript{76} and, along with Delaware's Declaration, prohibited ex post facto legislation.\textsuperscript{77} North Carolina's Declaration provided a right to an indictment or presentment.\textsuperscript{78}

\textsuperscript{72} See, e.g., N.Y. Const. of 1777, reprinted in 7 Sources and Documents, supra note 30, at 168 (omission of such guarantees as the right of confrontation and the privilege against self-incrimination); S.C. Const. of 1778, arts. XL, XLI, reprinted in 8 Sources and Documents, supra note 30, at 475 (adoption of only law-of-the-land and proportional-punishment provisions). In addition, many states chose to omit Virginia's requirement of a unanimous verdict in criminal cases. See, e.g., N.J. Const. of 1776, art. XXII, reprinted in 6 Sources and Documents, supra note 45, at 452. Of course, the failure to include these guarantees in a state constitution did not preclude their recognition as a matter of common or statutory law. See N.Y. Const. of 1777, art. XXXV, reprinted in 7 Sources and Documents, supra note 30, at 177-78.

\textsuperscript{73} Pa. Const. of 1776, art. IX, reprinted in 8 Sources and Documents, supra note 30, at 277, 278.

\textsuperscript{74} See id. art. X, reprinted in 8 Sources and Documents, supra note 30, at 279.

This section provided as follows:

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

\textit{Id.}

\textsuperscript{75} Id. § 26, reprinted in 8 Sources and Documents, supra note 30, at 283. Provisions governing bail and proportional punishment were also included in the Plan or Frame of Government, rather than in the Declaration of Rights. \textit{Id.} §§ 29, 38, reprinted in 8 Sources and Documents, supra note 30, at 283, 284.

\textsuperscript{76} See Md. Declaration of Rights of 1776, art. XVI, reprinted in 4 Sources and Documents, supra note 30, at 373.

\textsuperscript{77} See id. art. XV, reprinted in 4 Sources and Documents, supra note 30, at 373; Del. Declaration of Rights of 1776, § 11, reprinted in 2 Sources and Documents, supra note 30, at 198. The Delaware provision was adopted two months before Maryland's. See 1 B. Schwartz, supra note 26, at 276. Nonetheless, the delegates to Delaware's convention were probably influenced by the original draft of the Maryland provision, which was available three months before the final version was adopted. See id.

\textsuperscript{78} See N.C. Declaration of Rights of 1776, art. VIII, reprinted in 7 Sources and Documents, supra note 30, at 402.
Massachusetts was the first state to submit its proposed constitution directly to the people for ratification. In 1778, efforts to secure approval of a draft prepared by the House of Representatives and Massachusetts Council were soundly defeated, with the principal objections including the absence of a special constitutional convention, problems with apportionment, and the absence of a declaration of rights.\textsuperscript{79} A convention was elected in 1779, and although thirty delegates were to compose an initial draft, the work was done almost entirely by John Adams.\textsuperscript{80} The resulting Declaration of Rights, with its provisions concerning the rights of the accused, was an extraordinary blend of traditional protections and pointed elaboration. Protections against excessive bail or fines, "cruel or unusual punishments" (a variation on the wording of the English Bill of Rights),\textsuperscript{81} ex post facto laws,\textsuperscript{82} and bills of attainder\textsuperscript{83} were included, as were, among others, the rights to trial by jury, counsel, confrontation, and the privilege against self-incrimination.\textsuperscript{84} Perhaps most noteworthy was Adams's phrasing of the provi-

\textsuperscript{79} See, e.g., The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, at 292-96 (O. Handlin & M. Handlin eds. 1966) (objections of inhabitants of Town of Beverly to 1778 constitution); id. at 307-10 (objections of citizens of Boston). See generally id. at 171-365 (reprinting documents relating to 1778 constitution); Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775-1780, at 48-89 (R. Taylor ed. 1961) [hereinafter cited as Colony to Commonwealth] (outlining history of 1778 draft constitution).

\textsuperscript{80} See Colony to Commonwealth, supra note 79, at 113; Howard, Runnymede, supra note 5, at 207-09.

\textsuperscript{81} Mass. Const. of 1780, pt. I, art. XXVI (emphasis added), reprinted in 5 Sources and Documents, supra note 30, at 95; see supra note 26 and accompanying text (language of English Bill of Rights).

\textsuperscript{82} See Mass. Const. of 1780, pt. I, art. XXIV, reprinted in 5 Sources and Documents, supra note 30, at 95.

\textsuperscript{83} Id. art. XXV, reprinted in 5 Sources and Documents, supra note 30, at 95.

\textsuperscript{84} See id. art. XII, reprinted in 5 Sources and Documents, supra note 30, at 94. Article 12 provided as follows:

No subject shall be held to answer for any crimes or no offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

sion governing searches and seizures, for it included the first standard of "reasonableness" appearing in that context in an American constitution:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.\textsuperscript{85}

John Adams had been present at James Otis's famous argument in 1761 concerning writs of assistance, an event that made a lasting impression on him\textsuperscript{86} and undoubtedly contributed to his conception of investigative abuse.

The rich diversity of these early constitutional provisions, with their selectivity and differing emphases, remains a principal characteristic of state constitutional law today. Just as their vintage underlines their independent tradition, the care of their draftsmen and the deliberations of those who adopted them emphasize their central role in our American notions of self-government. In later years, as subsequent periods of state constitutional development reflected major social changes such as the process of democratization of the 1820's and 1830's, the Civil War and Reconstruction, and the industrialization at the turn of the century,\textsuperscript{87} the revolutionary era's con-

\textsuperscript{85} Mass. Const. of 1780, pt. I, art. XIV, \textit{reprinted in} 5 Sources and Documents, supra note 30, at 95. The virtually identical committee draft of this provision is reproduced in 1 B. Schwartz, supra note 26, at 372.

\textsuperscript{86} See 2 Works of John Adams, supra note 8, at 521-23 (Adams's abstract of Otis's speech); see also Howard, Runnymede, supra note 5, at 133-36 (detailing Adams's recollection of Otis's speech).

\textsuperscript{87} On these subsequent periods of constitutional development, see J. Dealey, \textit{Growth of American State Constitutions from 1776 to the End of the Year 1914}, at 20-23, 47-113 (1915); Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820's (M. Peterson ed. 1966) [hereinafter cited as Democracy, Liberty]; M. McCarthy, \textit{The Widening Scope of American
ception of individual rights as fundamental limitations upon the very powers of the state governments remained unchanged.

III. THE NATURE OF STATE CONSTITUTIONAL GUARANTEES

At first glance, the absence of significant contemporary commentary on the nature of these early constitutional protections for the accused is striking. Even John Adams’s lengthy Defence of the Constitutions of Government of the United States, written in 1787 in response to critics of the structures of the state governments, made only passing reference to the rights to trial by jury and the writ of habeas corpus as among those attributes of the state constitutional schemes that had vested sovereignty in the people. Other commentators of the period seemed equally preoccupied with the allocation of state governmental powers. Indeed, it is only when one recalls the colonial experience with many of the familiar “rights of Englishmen” embodied in the American state constitutions that one can understand the apparent view that the truly revolutionary aspects of those documents were the mechanisms designed to avoid the concentration and abuse of power. Chancellor Kent’s observations in 1827 seem to reflect the early commentators’ primary concerns:

Several of the early state constitutions had no formal bill of rights inserted in them; and experience teaches us, that the most solid basis of public safety, and the most certain assurance of the uninterrupted enjoyment of our personal rights and liberties, consists, not so much in bills of rights, as in the skilful organization of the government, and its aptitude, by means of its structure and genius, and the spirit of the people which pervades it, to produce wise laws, and a just, firm and intelligent administration of justice.

Nonetheless, Chancellor Kent, himself an influential figure in New York’s constitutional revision of 1821, did not entirely derogate

Constitutions (1928); J. Phillips, Recent State Constitution-Making 69-71 (1904); Howard, supra note 68, at xiii-xiv.
89 See id. at 3-4.
90 See id. at 96.
92 2 J. Kent, Commentaries on American Law 8 (New York 1827).
93 See Democracy, Liberty, supra note 87, at 125-270; see also 2 J. Kent, supra note 92, at 6-7 (discussing New York’s 1821 constitutional revision).
the normative influence of guarantees contained in state bills of rights:

[T]here is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private right. It requires more than ordinary hardness and audacity of character to trample down principles which our ancestors cultivated with reverence; . . . which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are part of the muniments of freemen, showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary, instituted as the appropriate guardian of private right. 94

Thomas Cooley's *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States*, 95 originally published in 1868, remains the most extensive commentary on the early state constitutions. Professor Cooley notes that unlike the government of the United States (one of enumerated powers), the governments of the states possess "all the general powers of legislation." 96 Consequently, while the federal Constitution provides grants of legislative power, the function of each state constitution is to limit those legislative powers inherently possessed. 97 Cooley states: "[T]he forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions which establish them are

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94 2 J. Kent, *supra* note 92, at 5-6; *see also* J. Story, *Commentaries on the Constitution of the United States* 693-98 (Boston & Cambridge 1833) (analyzing objections to and necessity of a bill of rights). Justice Story asserts that "a bill of rights is important, and may often be indispensable, whenever it operates, as a qualification upon powers, actually granted by the people to the government."  Id. at 695.


96 Id. at 173. As Madison wrote, well before the adoption of the tenth amendment,

[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. *The Federalist* No. 45, at 290 (J. Madison) (H. Lodge ed. 1900).

equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other." While Cooley's conception of plenary legislative power was grounded in the presumed intention of the people in establishing the state's legislative body—and was therefore hardly immutable—it has exerted a tremendous influence upon the views that state courts have taken of their own constitutions. It certainly represents the prevalent, if not universal, approach taken today.

Professor Cooley's distinction between state and federal constitutions does not by itself reflect the significant differences in the nature of their respective bills of rights. Both serve as limitations in their own contexts. Nevertheless, the status of most state provisions as limitations of power illuminates the fact that a state court's interpretation of its bill of rights does not represent a substantial departure from its normal constitutional function. Far from constituting an exotic incursion into uncharted territory, the interpretation of a state bill of rights guarantee requires much the same process as does constitutional decision making in other areas, necessitating a careful consideration of both the powers of the governmental branch involved and the relationship of the judiciary to that branch under the state's constitutional scheme. It is therefore very clear that the role of a state judiciary in defining the limits placed upon the state's criminal process by a provision of the state constitution is fundamentally different from that of a federal court in defining a federal constitutional limitation imposed upon the states.

IV. CURRENT PATTERNS OF STATE CONSTITUTIONAL ANALYSIS

The development of state constitutional doctrine has been characterized by two distinct patterns of decision making, which, while occasionally appearing together, warrant separate analysis.

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98 Id. at 177.
99 See id. at 87. Professor Cooley states,
In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States.

Id.

The first has been judicial reliance upon state constitutional law as a result-oriented, evasive technique for avoiding undesirable federal results and insulating a decision from federal review. This has rightly been criticized as inappropriate and unprincipled and is clearly incapable of mustering the sort of normative legitimacy that sound constitutional policy should command.

The second pattern is reflected in a very real tendency on the part of most courts to address state constitutional issues only when federal constitutional law does not resolve the matter—for example, when the challenged practice is valid under a federal guarantee. This interstitial or supplemental approach has at times been manifested by an explicit policy requiring an initial examination of federal law and is said to acknowledge the "reality" of the dominant role of the federal Constitution as a common denominator of American liberties. For a number of years, Justice Hans Linde has been the leading critic of this approach, arguing that it derogates the historical role of state constitutions as independent sources of personal liberties and that it does not comport with the traditional judicial preference for relying upon state law before reaching a federal issue. He has maintained that a state constitution merits a court's attention—with a view toward the development of principled and independent analysis—before the court looks to the federal document.

103 See id. at 708-09, 718; see also id. at 719 (discussing the New Jersey Supreme Court's approach in Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982)); cf. Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1356-66 (1982) [hereinafter cited as Developments] (arguing that state courts must recognize the dominance of federal constitutional law).
104 See Pollock, supra note 102, at 718.
106 Linde, E Pluribus, supra note 105, at 178-79; Linde, First Things First, supra note 3, at 383-84, 392-93; cf. Linde, Without "Due Process," supra note 1, at 135 (state courts should consider substantive due process challenges to state legislation under state constitution before looking to due process clause of fourteenth amendment to federal Constitution). A third approach, taken by the Vermont Supreme Court in State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982), fully elaborates upon both federal and state constitutional precedents. This wide-ranging exposition of constitutional rights has been criticized by several commentators. See Linde, E Pluribus, supra note 105, at 178; Pollock, supra note 102, at 718. In his article, Justice Pollock observes that consideration of both federal and state grounds in each case could result in "a body of state constitutional law that merely mimics the federal rulings."
In light of the rich and independent tradition of state guarantees, particularly in the area of criminal process, Justice Linde's recognition of the importance of state sovereignty certainly commends itself as a sound observation. It is equally clear, however, that for the foreseeable future most state courts will continue to address state constitutional issues on an interstitial basis. This may be explained by several factors. First, as has often been observed, both advocates and courts are now accustomed to thinking in terms of federal rights, and habits (not just old ones) die hard. Second, a general preference for "narrow" decisional grounds does not necessarily require reliance upon state law. A limited principle, fitting neatly into an established body of federal doctrine, may prove to have fewer unanticipated or undesirable consequences than the articulation of novel state constitutional doctrine. Third, whatever may be the soundness and preferability of Justice Linde's approach, the prevalence of the interstitial pattern has itself given the latter an appearance of legitimacy. It simply does not appear to most courts that reliance upon an "alternative" federal right is patently improper. Finally, to a busy state court seeking counsel and consistency, there is little competition for the vast body of precedent that has developed under our federal constitutional provisions.

One need not conclude, as some do, that the interstitial approach necessarily precludes the development of a full body of state constitutional doctrine. It does, however, pose significant problems, which, if not addressed, will impede this development. As several authors have noted, the interstitial use of state provisions can discourage original thinking, and may also foster an inappropriate, apologetic explication of "supplemental" state rights. In addition, while a result-oriented judicial use of the

Id. He maintains that this is contrary to the purpose of independent analysis of the state's own constitution. Id.

107 See Howard, supra note 68, at xxii; Linde, E Pluribus, supra note 105, at 174-75.

108 Justice Linde's preference for state rather than federal grounds presents a significantly different question, which involves substantial issues of federalism. See Linde, First Things First, supra note 3, at 383-84. He maintains that recourse to federal law is improper when the state constitution provides a dispositive answer. See Linde, E Pluribus, supra note 105, at 178. Although he recognizes that "[t]he United States Constitution is the supreme law of the land," Justice Linde argues that "state court[s] should . . . examine . . . state law first, before reaching a federal issue." Linde, First Things First, supra note 3, at 383-84.

109 See Linde, E Pluribus, supra note 105, at 178; Developments, supra note 103, at 1394 n.179.

110 Linde, E Pluribus, supra note 105, at 177; cf. Williams, In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S.C.L. Rev. 353, 356 (1984) ("Supreme Court decision casts a shadow over subsequent
state constitution is clearly improper, the interstitial process tends to give the appearance of this practice, thus undermining the normative influence of a state's constitutional doctrine in general. With an interstitial approach, far more attention must be paid to the placement of a specific holding within a broader doctrinal framework. This visibility of principle is as important when a procedure is upheld against state constitutional challenge as when it is invalidated.

V. TOWARD A MORE APPROPRIATE ANALYTICAL FRAMEWORK

In formulating a method of analyzing state constitutional issues in the sphere of the criminal process, it is especially important that the relationship between the state judiciary and the governmental branch undergoing review be examined, for substantial differences in the nature of the judicial role might well exist. The nature of a state's judicial review of legislative action will of course be a function of both constitutional text and that state's unique tradition. Specific action by the police or a prosecutor might be coupled with varying degrees of statutory authorization, carrying potential consequences for the standard of review. Furthermore, the supervision of the constitutional regularity of judicial proceedings might well require less deference than review of the actions of the other branches of government. While these concerns have no significance for federal review of state criminal procedures, they are central to a principled and systematic interpretation of state constitutional protections.

Considering the independent development of judicial review among the states, variations among the standards for assessing the constitutionality of a statute are to be expected. With regard to the criminal process, such standards are usually expressed in terms of the strength of the presumption of constitutionality and the burden required of a challenger. Such burdens range from

state litigation on what otherwise would be purely a question of state constitutional interpretation")

111 See supra note 101 and accompanying text.

112 See Note, supra note 1, at 316; see also Linde, E Pluribus, supra note 105, at 178 (criticizing interstitial approach as "more pragmatic than principled").

establishing unconstitutionality “beyond a reasonable doubt”\textsuperscript{114} to showing “clear” incompatibility with the state constitution.\textsuperscript{115} Often, the standard of review applicable to civil statutes is applied to either broad or specific guarantees of criminal rights.\textsuperscript{116} There is certainly a need for a critical judicial assessment of the suitability of generally applicable standards in the criminal context, and there is also a good deal of room for the fine-tuning of review in accordance with the nature and history of the particular constitutional provision involved.

In many states, the time may also be ripe for a broader theoretical consideration of the legitimacy and scope of judicial review within the state’s own constitutional framework.\textsuperscript{117} Such an examination would be of special importance in those jurisdictions where traditional notions of criminal culpability are “constitutionalized” within broad, open-ended provisions such as due process or law-of-the-land clauses.\textsuperscript{118} As Professor Howard has recently observed, “The familiar debate over the legitimate bounds of [federal] judicial review . . . raises questions that apply, in somewhat altered form, to state courts’ use of state constitutions to displace legislative or other political judgments.”\textsuperscript{119}

With regard to the review of actions of law enforcement authorities, one may begin with the obvious and conventional wisdom that plenary legislative power belongs only to a state’s legislature,\textsuperscript{120} and the existence and extent of constitutional or statutory authorization therefore remains important. In addition, in both the investigative and adjudicative phases, executive action is quite often mingled with specific actions of the judiciary. In such a situation, state courts remain free to develop their own views concerning the constitutional supervision of each branch,


\textsuperscript{117} See Howard, supra note 68, at xviii-xix; Linde, E Pluribus, supra note 105, at 174-77.


\textsuperscript{119} Howard, supra note 68, at xviii-xix.

\textsuperscript{120} See T. Cooley, supra note 95, at 87-88.
cognizant of the difference between their own constitutional role and that of the federal courts.

This now promises to be of added significance in the area of search and seizure, for the Supreme Court's rulings in *United States v. Leon*\(^{121}\) and *Massachusetts v. Sheppard*,\(^{122}\) admitting evidence obtained by police in reasonable reliance upon invalid search warrants,\(^{123}\) included the unqualified observation that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."\(^{124}\) The Court found no evidence that state magistrates were in need of federal supervision, nor any indication that the exclusion of evidence obtained pursuant to defective warrants would remedy existing abuses.\(^{125}\) Clearly, state courts responding to the mandates of their own constitutions are free to address local conditions as they find them and to fashion appropriate institutional remedies.\(^{126}\)

In the assessment of judicial action, a state court's power of constitutional review is at its height, for an interest in the protection of the integrity of the judicial process combines with the traditional and textual authority for the enforcement of a specific constitutional provision. This power should be distinguished from the exercise of a court's "supervisory" function, which usually extends to nonconstitutional matters and is traditionally subject to legislative change.\(^{127}\) The authority for this power of constitutional review derives most firmly from the structure and scope of the substantive guarantee being enforced. It may also

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\(^{123}\) *Leon*, 468 U.S. at 926; *Sheppard*, 468 U.S. at 990-91.

\(^{124}\) *Leon*, 468 U.S. at 916; see also *Sheppard*, 468 U.S. at 990 (expressing the same view).

\(^{125}\) *Leon*, 468 U.S. at 916-17. The Court also observed that "admitting evidence obtained pursuant to a [defective] warrant . . . will [not] . . . lead to the granting of all colorable warrant requests." *Id.* at 917 (footnote omitted).

\(^{126}\) Of course, a state court may decline to adopt the Supreme Court's "deterrence rationale" as the standard for the exclusion of evidence under its state constitution. Cf. *id.* at 931-43 (Brennan, J., dissenting) (rejecting deterrence as the rationale behind the exclusionary rule). It may also conclude that its own search-and-seizure provision is more specifically designed to exclude the fruits of invalid warrants. See, e.g., *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1987) (rejecting good-faith exception); cf. *Leon*, 468 U.S. at 969-71 (Stevens, J., dissenting) (noting that fourth amendment was intended to curb warrants based on insufficient evidence).

be argued that the protection of judicial integrity constitutes an independent constitutional justification inhering in the nature of a state's judicial power. In either event, such a review involves a state judiciary in the assessment of matters within its own expertise. Judgments in this area are far less likely to be criticized as antidemocratic checks upon the people's elected representatives or as involving policy determinations beyond the scope of judicial competence.

Cognizance of the institutional relationships involved in the implementation of a state constitutional guarantee remains only a factor to be considered in the development of state constitutional doctrine. Legitimate analysis must begin with the text and history of the provision involved and must be sensitive to the uniqueness and diversity so often reflected in state constitutional development. Commentators have only recently addressed this matter in detail, pointing out some of the major characteristics of state constitutional law that bear upon such an investigation. For example, Justice Robert F. Utter has noted that textual analysis of a constitution must be undertaken with the goal of discovering the intent of the voters in ratification, rather than simply the intent of the framers: "Thus, the 'common and ordinary meaning' in which the constitution's words must be construed is the meaning they would have had to the vast majority of ordinary voters, rather than to a group of highly educated lawyers and legislators, as may sometimes be considered when construing statutes." 

In addition, construction of a state constitution must be consistent with the restrictions contained in any enabling act authorizing the constitutional convention. Minutes of the

128 See, e.g., Deukmejian & Thompson, All Sail and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975, 999-1006 (1979). The authors criticize "[t]he California Supreme Court's willingness to assume functions . . . previously entrusted to the legislature." Id. at 1004.


130 Utter, supra note 129, at 510; see Williams, supra note 3, at 196-97. Popular ratification has become a standard feature of modern American constitutions. See Bartley, Methods of Constitutional Change, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 21, 35-36 (W. Graves ed. 1960).

131 Utter, supra note 129, at 510-11. On the procedure for the admission of new states, including those drafting constitutions without legislative authorization, see T. Cooley, supra note 95, at 26-28; J. Dealey, supra note 87, at 15-20.
convention's proceedings, contemporaneous news accounts, summaries included on the ballots, and the antecedent circumstances giving rise to a constitutional change may all be examined in ascertaining the intention of the voters.\textsuperscript{132} Other constitutions that have been influential in the formulation of a provision can be examined, although there is danger in assuming that similar language manifests a similar intention.\textsuperscript{133} Even if it is established that the framers and ratifiers intended to model their efforts after a provision in another jurisdiction, it does not follow that subsequent interpretations in that jurisdiction must be mirrored by the adopting state's judiciary.\textsuperscript{134} It simply does not comport with common sense to assume that the use of an existing provision as a model constitutes a surrender of state judicial sovereignty. With regard to the examination of precedent under the Federal Constitution, the Supreme Court's opinion in \textit{Michigan v. Long} \textsuperscript{135} has facilitated the ability of a state court to examine Federal authority without obfuscation of the basis for its decision. It need only provide "a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result" to assure the Court's recognition of the holding as grounded in state constitutional law.\textsuperscript{136}

The extent to which constitutional interpretation may properly reflect contemporary values is likely to be a matter of diversity among the states.\textsuperscript{137} Different areas of the country may reject values that are widely accepted in other regions. In all jurisdictions, however, the application of other states' similar constitutional provisions to like problems may be considered persuasive authority. Persuasiveness should depend not only upon parallels

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\item \textsuperscript{132} Levinson, \textit{Interpreting State Constitutions by Resort to the Record}, 6 FLA. ST. U.L. REV. 567, 569 (1978); Utter, \textit{supra} note 129, at 511-13, 516-18; Williams, \textit{supra} note 3, at 197-98.
\item \textsuperscript{133} Utter, \textit{supra} note 129, at 513-16.
\item \textsuperscript{134} See id. at 514-15.
\item \textsuperscript{135} 463 U.S. 1032 (1983).
\item \textsuperscript{136} \textit{Id.} at 1041. The \textit{Long} decision can properly be criticized for its presumption that Federal jurisdiction is appropriate when reliance upon an adequate and independent state ground is unclear. See Comment, Michigan v. Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision, 69 IOWA L. REV. 1081, 1099-1101 (1984); Collins, Reliance on State Constitutions: Some Random Thoughts, in \textbf{DEVELOPMENTS IN STATE CONSTITUTIONAL LAW}, \textit{supra} note 68, at 1, 10-11.
\item \textsuperscript{137} See Utter, \textit{supra} note 129, at 521-24; see also State v. Hunt, 91 N.J. 338, 367, 450 A.2d 952, 966 (1982) (Handler, J., concurring) (public attitudes can affect courts' interpretations of constitutional rights).
\end{itemize}
in the text of the provisions themselves, but also upon the similarities in the institutional relationships involved.

VI. SOME ADDITIONAL CONSIDERATIONS

Several perceived institutional constraints also threaten to slow the development of state constitutional doctrine, but at times they are given exaggerated importance in justifying the reluctance of some courts to approach their constitutions systematically. The election of many state judges certainly increases their accountability, and this is often perceived as a potent control upon unwise decision making. Likewise, the relative ease with which state constitutions may be amended by legislative proposal or popular initiative adds to the responsiveness of constitutional decision making. While the prospect of the correction of decisions through constitutional amendment has been regarded by some as facilitating judicial activism, fears of institutional damage to the judicial branch through the politicization of its decisions have also been expressed.

It is a mistake to assume that these mechanisms for maintaining the responsiveness of state constitutional law will manifest themselves in an automatic popular reaction against the expansion of individual rights. With regard to the criminal process, the most significant popular repudiations of constitutional policy

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138 Cf. Utter, supra note 129, at 495-96 (noting that Washington state judges are elected, while federal judges have life tenure). On the various procedures employed for the selection of state judges, see COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 161-63 table 4.4 (1986) [hereinafter cited as BOOK OF THE STATES].

139 Constitutional amendment initiated by legislative proposal is available in all states, and amendment by popular initiative is available in 17. See BOOK OF THE STATES, supra note 138, at 16 table 1.2, 18 table 1.3. See generally Collins, Government by Popular Initiative: States Amend Their Constitutions, Nat'l L.J. June 18, 1984, at 14, col. 1 (detailing the constitutional amendment processes used in several states and the resulting effects upon state constitutional interpretation).

140 See Collins, supra note 3, at 17 & n.62; Utter, supra note 129, at 496; Developments, supra note 103, at 1354. As one author observes, "if a court's interpretation of the constitution deviates sufficiently from public sentiment, a majority vote can overrule the court's reading." Id.

141 See Galie, The Other Supreme Courts: Judicial Activism Among State Supreme Courts, 33 SYRACUSE L. REV. 731, 791-92 (1982); Utter, supra note 129, at 496. Galie notes that because a state constitution can easily be amended, the state judiciary will be unable to circumvent "the will of a substantial majority" of the people. Galie, supra, at 791-92. This, he argues, may foster a policy of judicial activism. Id. at 791.

142 See Porter, State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 3, 10 (M. Porter & G. Tarr eds. 1982); cf. Collins, supra note 3, at 17 n.62 (noting one state's judges' hesitancy to rely on state constitution for fear of being overruled by constitutional amendment).
have been amendments focusing upon the restoration of capital punishment and the scope of the exclusionary rule. In light of the wide range of judicial developments in this area, such efforts have been relatively infrequent. Few issues excite a polarization of opinion as do these, and electorates are capable of differentiating between the merits of a particular policy and a generalized animus against acknowledging the rights of the accused. It would be presumptuous indeed to suppose that a state court’s own approach to problems like those addressed in Schneckloth v. Bustamonte or its independent view of prosecutorial abuse in the courtroom would be greeted by popular indignation.

To the contrary, there is every indication that the prizing of self-government and the appreciation of diversity that underly our state constitutional provisions are widely shared, and the notion of local sovereignty over significant aspects of our individual freedoms remains a source of pride and promise. Ultimately, the legitimacy and influence of a state’s constitutional doctrine will be determined by its adherence to principle, by its persuasiveness, and by the willingness of the state judiciary to explore the uniqueness of its own institutions and constitutional heritage. This is as it should be.

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143 See, e.g., CAL. CONST. art. I, § 27 (stating that death penalty constitutes neither cruel nor unusual punishment); id. art. I, § 28(d) (“relevant evidence shall not be excluded”); FLA. CONST. art. I, § 12 (limiting scope of exclusionary rule); see also In re Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) (recognizing that constitutional amendment could prevent state courts from suppressing evidence admissible under federal Constitution). For an account of the circumstances surrounding the adoption of the latter two provisions, see Wilkes, The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, supra note 68, at 166.

144 Recent experience in Oregon furnishes an excellent example. A much-discussed challenge to Justice Linde’s re-election, based in part upon his expansive view of the Oregon Constitution, was handily defeated. See Easy Victory Seen for Linde, Oregonian, Nov. 7, 1984, at C1, col. 1; Runoff Election Slated for Ore. High Court Seat, Nat’l L.J., June 4, 1984, at 19, col. 1; Ore. Court Seat Fight Gets Bitter, Nat’l L.J., May 14, 1984, at 3, col. 3. On the day of Justice Linde’s re-election, however, Oregon voters also overwhelmingly approved a measure restoring the death penalty. See Easy Victory Seen for Linde, supra, at C1, col. 1.

145 412 U.S. 218 (1973). In Schneckloth, the United States Supreme Court held that a suspect’s knowledge of his right to refuse to permit a search was merely a factor to be considered in determining the voluntary nature of his consent. Id. at 249. The Court declined to require the prosecution to prove “such knowledge as a prerequisite to establishing a voluntary consent.” Id. But see State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (rejecting Schneckloth). In Johnson, the New Jersey Supreme Court relied on the state constitution and imposed “the burden of showing . . . knowledge of the right to refuse consent” on the prosecutor. Id. at 353-54, 346 A.2d at 68.